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AZMAN SULAIMAN v. MUHAMMAD AQIL AFDHAL RUSLAN (A CHILD SUING THROUGH HIS FATHER AND NEXT FRIEND; RUSLAN DISA) & ANOR

HIGH COURT MALAYA, PULAU PINANG
AZMI ABDULLAH JC
B [CIVIL APPEAL NO: PA-12B-17-03-2016]
30 SEPTEMBER 2017

ROAD TRAFFIC: *Accident – Appeal against quantum and liability – Collision between motorcycle and bicycle ridden by minor – Motorcycle rider familiar with*
C *road and area – Whether motorcycle rider's narration of events credible – Minor suffered injuries and sued through parent – Whether liability ought to be imputed wholly on motorcycle rider – Whether minor could be imputed with liability – Whether minor's parent ought to be held accountable and culpable for not monitoring minor – Whether damages awarded to minor excessive*

D

An accident occurred between the first respondent ('the plaintiff'), a minor who was riding a small bicycle, and the appellant ('the defendant'), who was riding a motorcycle. The collision took place at a housing area where the plaintiff was coming out from the junction situated on the defendant's left. There were yellow lines on the road as there was a kindergarten in that area
E and the speed limit was 30km/h. The defendant, who was familiar with the road and area, narrated that the plaintiff suddenly came from the left and, although the defendant swerved to the right to avoid collision, the plaintiff collided into his motorcycle's left-hand side. The plaintiff sustained injuries and, through his father, commenced an action against the defendant at the
F Sessions Court. The second respondent ('the plaintiff's father') was brought in by the defendant as the third party in the suit before the Sessions Court Judge ('the SCJ'). The SCJ imputed liability wholly against the defendant and dismissed the defendant's case against the third party. The SCJ further awarded the plaintiff with RM180,000 for the head injury sustained. Hence
G the present appeal. The defendant appealed against the issue of liability and quantum. On liability, the defendant argued that the plaintiff's father, by not monitoring his son and unknowingly allowing him to stray out from the house into the street resulting in being collided into, should be held accountable and culpable.

H **Held (dismissing appeal):**

(1) The five-year old plaintiff could not and should not be imputed any liability. A five-year old infant could not be expected to exercise the same degree of caution as children of school-going age. However, the infancy of the plaintiff was not the sole consideration of the present
I appeal. The defendant gave unconvincing evidence to exonerate his culpability in causing the accident. The defendant testified that he took the step of swerving to the right to avoid colliding into the plaintiff.

However, this was not contained in his police report. Any omission in the police report with the additional evidence suddenly being adduced in the court should be viewed with apprehension by the courts. Furthermore, the damage to his motorcycle was a scratch mark to the front cover and this was supportive of the evidence the defendant impacting the plaintiff frontally than the plaintiff colliding into the defendant's left hand side. (paras 13 & 14)

(2) The defendant should be imputed total liability and the decision of the SCJ was sustainable. There was evidence that the defendant realised that the plaintiff was coming from one metre away. The defendant had ample and sufficient time to reduce speed to avoid from colliding if he had been keeping a safe and reasonable speed in the circumstances. Being a person who was familiar with the area and knowing fully-well the existence of a kindergarten in the vicinity and taking cognisance of the fact that the area was a residential area, the defendant should have exercised even greater caution. There was no visual obstruction to the defendant's vision and the defendant admitted that it was a straight road and he could see any oncomings from the junction on his left. (paras 17 & 18)

(3) It was apparent that the plaintiff's father was not at the scene of the accident. However, he should not be imputed any liability for not knowing that the plaintiff slipped out from the house. To impose responsibility on the parent to be aware of a child's every movement, furthermore a five-year old, every second of the day was something beyond what is humanly-impossible. Such an imposition is to set the bar at an impossibly high standard which few parents, if any at all, could live up to. The defendant's action against the plaintiff's father was dismissed. (paras 23 & 24)

(4) The award of the SCJ was not manifestly excessive given the condition sustained by the plaintiff. The plaintiff was only five at the time of the accident. He has a whole lifetime to suffer and endure the effects of his injuries. Hence, the award of RM180,000 granted by the SCJ for the head injury and the resulting after-effects of the accident was maintained. (para 31)

Case(s) referred to:

Carmarthenshire County Council v. Lewis [1955] 1 All ER 565 ***(refd)***
Donaldson v. McNiven [1952] 2 All ER 691 ***(refd)***
Gough v. Thorne [1966] 3 All ER 398 ***(refd)***
Hang Jong Juan v. Tan Yeo Soon [1985] 1 CLJ 394; [1985] CLJ (Rep) 845 CA ***(refd)***
Haron v. Macaulay [1968] 1 LNS 47 FC ***(refd)***
Jones v. Lawrence [1969] 3 All ER 267 ***(refd)***
Mat Shah Mohamed & Anor v. Foo Say Meng & Ors [1983] 2 CLJ 194; [1983] CLJ (Rep) 254 FC ***(refd)***
Mohd Salleh Samad v. Zainodin Dongking [2002] 1 CLJ 139 HC ***(refd)***
Mohd Tajuddin Salleh v. Mokhari Murgis & Anor [1993] 3 CLJ 42 HC ***(refd)***

Pang Ah Chee v. Chong Kwee Sang [1985] 2 CLJ 221; [1985] CLJ (Rep) 236 FC ***(refd)***
Rasidin Partorjo v. Frederick Kiai [1976] 1 LNS 123 FC ***(refd)***
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***
Symes v. Ling Ngan Ngieng [1966] 1 LNS 192 HC ***(refd)***

For the appellant - Joshua Narendran; M/s Ajmer Sandhu & Ong
For the respondent - Shuroma Guna Thakurta; M/s Manjit & Co

Reported by Najib Tamby

JUDGMENT

Azmi Abdullah JC:

Introduction

[1] The appeal by the appellant/defendant ("defendant") before this court is on the issue of liability and quantum. On liability, however, the issue is specifically pertaining the parental responsibility, in this case being the father, when a child aged five years old was left unattended in going out of the house and having met with an accident due to being collided into by the defendant. The father has been brought in by the defendant as the third party in the suit before the learned Sessions Court Judge.

[2] This court on 27 July 2017, after perusing the written submissions of both counsel and further oral clarifications, decided to dismiss the appeal by the defendant lodged against the decision of the learned Sessions Court Judge in imputing liability wholly against the defendant and dismissing the appellant's case against the third party. This court in exercising its appellate jurisdiction maintained the award on general damages granted to the respondent/plaintiff ("plaintiff")

[3] The defendant being dissatisfied with the findings of this court on liability and quantum has filed a notice of appeal to the Court of Appeal; hence these grounds for decision.

Facts Of The Case

[4] The case relates to an accident that occurred between the plaintiff who was a minor and was riding a small bicycle on 25 December 2012 and the defendant who was riding motorcycle No. PKF 4621 at the material time of about 2.30 in the afternoon. Upon a study of the sketch plan and key at pp. 108-109 of the record of appeal, the defendant was riding from top to bottom of the sketch plan and the infant plaintiff was coming out from the junction situated on the defendant's left.

[5] These pertinent facts pertaining to the accident need to be observed:

(a) The accident site was a housing area.

(b) There were yellow lines on the road at the accident site as there was a kindergarten in that area.

(c) The speed limit at the taman perumahan (housing estate) is 30 km/h. A

(d) The plaintiff was only five years old at the time of the accident.

(e) The plaintiff's house was in the vicinity of the accident site.

(f) The defendant was familiar with the road and area.

B

Governing Principles

[6] This court would like to revisit the principles of appeals before delving further into the main issues of this appeal. The case of *Rasidin Partorjo v. Frederick Kiai* [1976] 1 LNS 123; [1976] 2 MLJ 214 has had the Federal Court observed that: C

> A court of appeal always starts with the working presumption that any decision appealed against is right in every aspect. So to succeed in an appeal the appellant must convince us that the decision appealed from is wrong. If we are not so convinced, the appeal fails.

[7] The Federal Court in the precedent of *Mat Shah Mohamed & Anor v. Foo Say Meng & Ors* [1983] 2 CLJ 194; [1983] CLJ (Rep) 254; [1984] 1 MLJ 237 has stated: D

> The learned Judge in this case had the advantage of seeing and hearing the witnesses which opportunity the appellate court did not enjoy and there was no reason in this case for the appellate court to interfere in the case. E

[8] The Court of Appeal case of *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 3 MLJ 395 has enunciated that:

> It is trite law that an appellate court will not readily interfere with the findings of fact arrived by the trial court to which the law entrusts the primary task of evaluation of the evidence. F

[9] It is apparent from these cases that the court in exercising its appellate jurisdiction should exercise restraint from interfering against the decisions of the court of first instance as the trial judges would have the benefit of seeing the conduct and demeanour of witnesses whilst giving evidence and especially when faced with being interrogated by counsel during cross-examination. There must be very substantive misdirection of facts and law before it would give merit to any such interference from the court sitting on appeal. G

H

Deliberations Of The High Court On Liability

Liability Of The Defendant

[10] This court is satisfied that the five years old plaintiff could not and should not be imputed any liability in this case. A five years old infant cannot be expected to exercise the same degree of caution as a child of school-going age. The authorities do support this supposition and finding. The case of *Gough v. Thorne* [1966] 3 All ER 398 did not apportion liability even on a 13 1/2 years old as it was found that: I

A An ordinary child of 13 1/2 (unlike an adult) could not reasonably be expected to pause to see for herself whether it was safe to go forward when the lorry driver had beckoned her on, and so the plaintiff had not been negligent in relying entirely on the lorry driver's signal to her to cross.

B **[11]** In *Symes v. Ling Ngan Ngieng* [1966] 1 LNS 192; [1966] 2 MLJ 149 with the facts of the infant plaintiff crossing a road and hit by a car driven by the defendant, the court decided that:

1. The defendant was entirely to be blamed for the accident and must be held liable for damages.

C 2. Even if there was evidence of negligence on the part of the plaintiff in this case, in view of her age no negligence could be attributed to her.

3. The negligence of the person in charge of the plaintiff was no answer to the claim by the plaintiff against the defendant.

D **[12]** In *Jones v. Lawrence* [1969] 3 All ER 267, the court held that a seven years old plaintiff who was crossing the road cannot be contributorily negligent by stating:

The infant plaintiff's conduct was only expected of a seven year old child and could not amount to contributory negligence.

E In my view the defendant has failed as a matter of probability to show that the infant plaintiff was culpable or that his behaviour was anything other than that of a normal child who is, regretfully, momentarily forgetful of the perils of crossing a road. After all, what he had failed to notice was not the oncoming movement of a lorry, a bus or a car but a motor bicycle which, of itself, is probably less likely to force itself, as it approaches on F the attention of a small child.

[13] The infancy of the plaintiff alone is not the sole consideration in the appeal before this court. The defendant gave evidence that were not convincing during the hearing to exonerate his culpability in causing the accident. The defendant when giving evidence in court narrated that he took G the step of swerving to the right to avoid from colliding into the plaintiff. This evidence of his action however was not contained in his police report found at p. 106 of the record of appeal. The authorities have certainly made clear that any omission in the police report with the additional evidence suddenly being adduced in court, should be viewed with apprehension by the H courts. In *Mohd Tajuddin Salleh v. Mokhari Murgis & Anor* [1993] 3 CLJ 42 it was stated:

If the appellant's version is to be accepted it should be reflected in his police report. Such failure would be fatal to the appellant's case. The Courts have consistently been emphasising on the need to mention I relevant facts in one's police report.

[14] In *Haron v. Macaulay* [1968] 1 LNS 47; [1969] 1 MLJ 169 it was held: A

> The appellant when making his report of the accident to the police made no mention of giving any warning; nor did he say anything about it when giving evidence before the magistrate in a case in which the respondent was charged with inconsiderate driving in regard to the same accident and acquitted. The first he ever mentioned about giving a warning was at the hearing of the present action. B

[15] The defendant gave evidence that it was the plaintiff that came suddenly from the left and collided into his motorcycle's left-hand side. The investigating officer, SP1 gave evidence that the damage to the motorcycle was a scratch mark to the front cover hence this evidence is supportive of C the defendant impacting with the plaintiff frontally rather than the plaintiff colliding into the defendant's left-hand side. In *Mohd Salleh Samad v. Zainodin Dongking* [2002] 1 CLJ 139 it was stated that the damages sustained would be invaluable in determining how the accident occurred:

> So far, there is consistency in the Respondent's version as set out in his statement of claim, in his police report, P2, and his oral evidence in court that he was collided into from the rear by the appellant's motorcar. Notwithstanding that the respondent has been consistent in his version as to how the accident occurred, his version must be supported by the available physical evidence, namely, damage to the rear of his motorcycle. D E

[16] Further, there was evidence that the defendant realised the plaintiff was coming from about 1 metre away and based on this evidence, this court finds that the defendant had ample and sufficient time to reduce speed to avoid from colliding if he had been keeping a safe and reasonable speed in the circumstances. F

[17] The defendant being a person who was familiar with the area and knowing full well the existence of a kindergarten in the vicinity and also taking cognisance of the fact that the area was a residential area (taman perumahan) should have exercised even greater than he did at the time of the accident. SP1 has narrated that there was no visual obstruction to the G defendant's vision and the defendant admitted as much during cross-examination that it was a straight road and he could see any oncomings from the junction on his left.

[18] Given all these factors, this court is entirely convinced that the defendant should be imputed total liability in this case and the decision of H the learned Sessions Court Judge is sustainable without having to be interfered with.

Liability Of The Third Party

[19] The main complaint by the defendant is the dismissal by the learned I Sessions Court Judge of the third-party action by the defendant against the father of the infant plaintiff. The defendant's solicitor very persuasively

A argued that the father by not monitoring his son and unknowingly allowing him to stray out from the house into the street resulting in being collided into should be accountable and held culpable.

[20] In his evidence, the father being SP2 admitted that he did not know that his son had gone out of the house at the material time. His wife was also
B at home and she also was not aware of the action of the son who had strayed out from the house to ride his bicycle. The wife however was not called to give evidence during proceedings before the learned Sessions Court Judge. The appellant submits that by not knowing and monitoring the movements of the infant son who had gone to the extent of straying out of the house, the
C father has been negligent of his duties as a parent.

[21] Counsel admirably have researched rather extensively on this issue with authorities from beyond our shores being cited. This court is very much persuaded by the decision in *Donaldson v. Mc Niven* [1952] 2 All ER 691 which concentrated on the negligence of a father in allowing his 13 years old
D son to carry an air rifle with his son using it to fire at a 5 years old child. The Court of Appeal held that:

> The case was put entirely on a lack of supervision, but how are you going to supervise a small boy for every hour of the day? I cannot see that he would do more than to extract a promise from his son never to use the
E air-gun in the street. He cannot be watching his son all day and every day, nor is there any obligation on him as a parent to do so. Some people have thought that parents ought to be responsible for the torts of their children, but they are not.

[22] Another decision that resonates with this court is *Carmarthenshire*
F *County Council v. Lewis* [1955] 1 All ER 565 with the facts that the mistress who was in charge of the child and distracted by attending to another boy who had suffered a cut was found not guilty of negligence when unknowingly the child of 4 got out of the school gate onto the lane resulting with the deceased in attempting to avoid from colliding into the infant met his
G untimely death. The House of Lords commented that:

> In such circumstances it appears to one perfectly natural that Ms. Morgan would never have thought that the children would wander out of the school into the yard much less go out through the gate into the lane.
>
> However careful the mistresses might be, minor emergencies and
H distractions were almost certain to occur from time to time so that some child or children would be left alone without supervision for an appreciable time.

[23] It is apparent in this case that the father was not at the scene of the accident. It is also evidenced in court that the father and his wife had three
I other children to attend to at the material time, a sister of the plaintiff and two other children, mentioned as "kakak dan two adik" at pp. 30 and 31 of

the additional record of appeal. This court finds that the father should not be imputed any liability in this case for not knowing that the infant plaintiff has slipped out from the house.

[24] For the court to impose responsibility on the parent to be aware of a child's every movement, furthermore a five-year old, every second of the day is something beyond what is humanly impossible, this court dares to say. Such an imposition is to set the bar at an impossibly high standard which few parents, if any at all, can live up to. Hence this court decides to dismiss the action by the defendant against the third party father in this case and in the same breath concurs with the decision of the learned Sessions Court Judge.

Findings On Quantum

[25] The defendant's specialist report (D14) states that the plaintiff sustains these injuries:

(a) decreased dexterity over the right hand;

(b) right-sided body weakness;

(c) difficulty putting on stocking and tying shoelace;

(d) needs assistance to brush teeth and clean private parts;

(e) right wrist held in flexion position and right hand is in the fisting position;

(f) right thumb not able to do flexion, extension, abduction and opposition;

(g) right foot drop noted, right-sided limbs power 4/5;

(h) MRI brain scan revealed cystic encephalomalacia of left corona radiate and basal ganglia;

(i) constructional apraxia;

(j) neurological deficits permanent;

(k) unable to perform dorsiflexion right ankle;

(l) hemiparetic gait permanent; and

(m) problem of clearing ground when walking, not able to run normally.

[26] The principles for overturning awards on quantum are numerous. The case of *Rasidin Partorjo v. Frederick Kiai* [1976] 1 LNS 123; [1976] 2 MLJ 214 is again of authority, the Federal Court has observed that:

> On an appeal against the damages awarded, the appellant had to convince the appellate court that the learned trial judge had acted on a wrong principle of law or had misapprehended the facts or had for other reasons made a wholly erroneous estimate of the damage suffered.

[27] The Court of Appeal in *Hang Jong Juan v. Tan Yeo Soon* [1985] 1 CLJ 394; [1985] CLJ (Rep) 845; [1986] 2 MLJ 5 it was held:

> In an appeal against the quantum of damages, it is settled law that the onus on the appellant is a heavy one and it must be established plainly that the trial judge's award was a wholly erroneous estimate.

[28] In *Pang Ah Chee v. Chong Kwee Sang* [1985] 2 CLJ 221; [1985] CLJ (Rep) 236; [1985] 1 MLJ 153, the Federal Court held that:

> The finding that a trial judge has erred in the discretion of being too generous would not be itself constitute a matter to be appealed from and the appellate court is always slow to reverse the trial judge's decision on assessment of damages unless there are strong grounds for interference.

[29] The learned Sessions Court Judge has given the award of RM180,000 for the head injury sustained by the infant plaintiff. It is within the observation of this court from the records that the plaintiff submitted the figure of the RM250,000 as the rightful award for the injuries sustained whereas the defendant's solicitor submitted the figure of RM75,000. This court finds the submission of the defendant's counsel particularly to be grossly inadequate. This court truly believes that counsel either for the plaintiff or for the defendant should provide authorities and submit figures that commensurate with the condition being sustained by the plaintiff. Counsel should not pluck figures from thin air that totally disregard the welfare and condition of the plaintiff.

[30] This court is not asking for counsel as well as the trial courts to succumb to sympathy in granting awards but by submitting figures that seem to totally disregard the actual and current condition of the plaintiff, counsels are not assisting the court in doing justice whereas dispensing justice is primarily the function of the courts. By indulging too much towards pleasing their clients, counsel may have overlooked the fact that counsels are there also to do justice and to assist the courts to perform this task.

[31] This court finds the award of the learned Sessions Court Judge not to be manifestly excessive given the condition being sustained by the plaintiff. It must be borne in mind that the plaintiff was only five years old at the time of the accident. This means that he has a whole lifetime to suffer and endure the effects of his injuries and this court cannot turn a blind eye to this consideration. Hence this court maintains the award of RM180,000 granted by the learned Sessions Court Judge for the head injury and the resulting after-effects of the accident.

Conclusion

[32] This court after revisiting the evidence adduced in the case before the learned Sessions Court Judge decides to dismiss the appeal with the decisions of the learned Sessions Court Judge on liability and quantum being maintained. Agreed costs of RM3,000 is granted to the plaintiff.